

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

JULIO PEREZ-RUIZ,  
PETITIONER,

V.

CASE NO. 00-0048

UNITED STATES OF AMERICA,  
RESPONDENT,

PETITIONER'S BRIEF IN SUPPORT OF MOTION PURSUANT  
TO TITLE 28 U.S.C. § 2255, TO VACATE, SET ASIDE,  
AND CORRECT CONVICTION AND SENTENCE

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Now comes the petitioner, Julio Perez-Ruiz, pro-se, in the above styled cause, and presents this honorable court with the following brief with memorandum of law in support of his motion to vacate, set aside, and correct conviction and sentence. The petitioner states the following to wit in support:

This court, in reviewing each claims should address the merits of each claim, regardless of the legal theories, poor syntax, sentencing construction, or the litigant's unfamiliarity with pleading requirements. Overall, an evidentiary hearing should be held in the event any fact is in dispute with the petitioner's claims. See, Title 28 U.S.C. § 2246.

Therefore, the petitioner submits the following brief in support of his § 2255 application seeking to vacate, set aside, and correct his conviction and sentence.

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INEFFECTIVE ASSISTANCE OF COUNSEL AND CLEAR ERROR  
FOR DISTRICT COURT'S FAILURE TO MAKE FACTUAL FINDINGS  
OF DRUG TYPE AND QUANTITY ATTRIBUTED TO THE PETITIONER

The petitioner contends that he has suffered a Sixth Amendment right violation of ineffective assistance of counsel, where his attorney failed to raise on direct appeal and remand that the district court erred in failing to make factual findings of the drug type and quantity attributable to him for his conspiracy conviction at sentencing. Additionally, the petitioner contends that clear error has occurred, as he had a fundamental procedural guaranteed right pursuant to the Federal Due Process Clause, to have the district court make factual findings of drug type and quantity at sentencing, and the court erred in failing to do so. The clearly erroneous standard applied to the present claims. See, U.S. v. St. Cyr, 977 F.2d 698, 701 (1st Cir. 1992).

The petitioner, having been convicted in this court by way of a jury trial, for a multiple drug conspiracy offense, has had the First Circuit vacate his sentence on direct appeal and order resentencing in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). See, U.S. v. Perez-Ruiz, 353 F.3d 1, 16 (1st Cir. 2003). The district court went on to resentence the petitioner to twenty (20) years after the First Circuit's remand, as the petitioner's resentencing occurred prior to the Supreme Court's ruling in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and U.S. v. Booker, \_\_\_\_ U.S. \_\_\_\_, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). See, U.S. v. Perez-Ruiz, 421 F.3d 11 (1st Cir. 2005). The petitioner contends that at no time during the direct appeal did counsel raise the argument that the district court failed to

make factual findings of the drug type and quantity that could be attributed to him at sentencing, nor did counsel raise the issue at resentencing and the appeal of the district court's resentencing. Counsel did make objections at the initial sentencing in reference to drug type and quantity, yet, counsel failed to further pursue the arguments. See, Exh. A. The petitioner contends that error occurred for his attorney failing to seek an appeal of the district court's failure to make factual findings of the drug type and quantity attributed to him, rendering his attorney ineffective. The petitioner also contends that the district court erred in failing to make factual findings in reference to the drug type and quantity attributable to him, when such was in dispute and he had a fundamental right for the court to do so.

The law was established at the time of the petitioner's sentencing, that the sentencing guidelines applicable at sentencing are those in effect at that time. See, U.S. v. Harotunian, 920 F.2d 1040, 1041-42 (1st Cir. 1990). Also, in reference to drug offenses (conspiracy), district court must make factual findings as to the scope of criminal activity undertaken by a particular defendant in the conspiracy. See, U.S. v. Marrero-Ortiz, 160 F.3d 768, 779 (1st Cir. 1998).

The First Circuit has ruled that in a narcotics case, drug quantity is an important integer in calculating the base offense level (and hence, the sentence itself). A defendant is not automatically saddled with the full weight of the conspiracy's drug quantity, rather a defendant is responsible for drugs that he

personally handled or anticipated handling, and under the relevant conduct rubric, for drugs involved in additional acts that were reasonably foreseeable by him and were committed in furtherance of the conspiracy. See, U.S. v. Sepulveda, 15 F.3d 1161, 1196-97 (1st Cir. 1993).

Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. Different types of drugs affect the offense calculation in different ways. Id. U.S. v. Marrero, 160 F.3d at 779. In estimating the quantity of drugs attributable to a defendant, a court may base its computation on evidence showing the average frequency and amounts of defendant's drug sales, drug transactions, and drug trips at specific times and places. Id. 160 F.3d at 779-80 and 15 F.3d at 1197-1202. The court in this case did not reference any evidence to support an assessment of drug type and quantity attributable to the petitioner at his initial sentencing, nor at resentencing after remand from the First Circuit. See, Sentencing trans. of March 18, 2002, and May 20, 2004.

The petitioner's attorney presented arguments in light of Apprendi, Blakely, and Booker on the appeal of the district court's resentencing, yet, counsel made no argument of the district court's error in failing to make factual findings of the drug type and quantity attributed to the petitioner. Id. 421 F.3d at 11. At resentencing, the district court merely attributed the petitioner the Fifteen (15) kilograms of cocaine that was alleged to be the quantity of drugs for the full conspiracy.

It is without dispute that the First Circuit ruled that there was very little credible information in reference to drug type and quantity that could be attributed to the petitioner for sentencing purposes, specifically, when there existed no drug evidence, and the government failed to present any factual foundation to support a drug quantity. Id. 353 F.3d at 18-19. The First Circuit went on further to state that the drug type and quantity did have weaknesses in the second appeal, yet, did not vacate the petitioner's twenty (20) year sentence, and concluded that district court's finding of 15 kilograms was adequately supported against any charge that the finding was clear error. Id. 421 F.3d at 11.

The petitioner brings to the court's attention that the district court erred, and a manifest injustice has occurred, where he was attributed fifteen (15) kilograms of cocaine for sentencing purposes, counsel failed to put on any evidence or testimony disputing the fifteen (15) kilograms, and the court attributed the petitioner the fifteen (15) kilograms, which was the full amount of drugs involved in the conspiracy, without factual determinations. Overall, the petitioner contends that the fifteen (15) kilograms attributed to him was based on false and unreliable information and testimony.

The petitioner contends that even assuming that he had involvement with the conspiracy of the present case, he had no knowledge, participation, nor association with the witnesses Joel Irizarry Rosario and Frankie Pietri Sepulveda. Also, the petitioner contends that he had no involvement with the La Cabra organization, nor did he have a drug point as alleged.

The petitioner contends that any information and testimony from the witnesses Irizarry and Sepulveda that he had association with them, that he had a drug point, and that he had involvement with the La Cabra organization, is false and unreliable. Id. Exh. B.

The law has long since been established that due process forbids a defendant being sentenced on the basis of false and unreliable information, testimony, and evidence. See, U.S. v. Tucker, 404 U.S. 433, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972). The First Circuit has established the law that the sentencing court is required to make an independent determination regarding the reliability and responsibility of information, evidence, and testimony relied upon for sentencing purposes, even when the evidence was presented at trial. See, U.S. v. Tavano, 12 F.3d 301, 306 (1st Cir. 1993). The sentencing court, moreover, must fully consider all evidence that undermines or contradicts a witness's testimony when making a sentencing determination. Id. U.S. v. Tavano, surpa.

The petitioner does not contend that he could be attributed fifteen (15) kilograms of cocaine for sentencing purposes, yet, even if he could be attributed such, the court was under a duty to determine whether the information, evidence, and testimony relied upon for determining the fifteen (15) kilograms were based on true and accurate information, evidence, and testimony. The district court in this case failed to perform this duty at the initial sentencing and at resentencing. Counsel failed to raise this issue at any time during direct appeal and the appeal of the district court's resentencing. Id.

The district court has not made an assessment of whether the information presented in the petitioner's sworn affidavit, which must occur at the present time contradicts the information, testimony, and evidence used for sentencing purposes. Id. U.S. v. Tavano, supra. and § 6A1.3(a), U.S.S.G..

In conclusion, the First Circuit ruled long ago in cases on appeal that the district court must make factual findings of the drug type and quantity attributable to a defendant at sentencing, and when the amount of drugs attributed to a defendant is in dispute, the court must make an independent resolution of the factual issue at sentencing. Id. 15 F.3d at 1199. The First Circuit only reaffirmed this established law in the petitioner's initial appeal. Id. 353 F.3d at 19.

Here, the court appears to have relied on speculation, conjecture, hunch, and intuition in sentencing the petitioner to to the fifteen (15) kilograms involved in the conspiracy, that which it cannot legally do. Id. Marrero-Ortiz, 160 F.3d at 780. The record and sentencing transcripts of resentencing is void and without any factual recitation of how the amount of drugs was calculated and attributed to the petitioner. Of most importance, the court did not rely on the average frequency and amounts of drug sales made by the petitioner, amounts of drugs given to the petitioner for sale or distribution, amounts of drugs purchased by the petitioner, amounts of drugs transacted, nor trips made for trafficking, distributing, possession, and purchasing of drugs by the petitioner. Such was required as established by the law in the First Circuit. Id. 160 F.3d at 779-80 and 15 F.3d 1197-1202.

This court did not reference any evidence to support an assessment that the petitioner was to be attributed fifteen (15) kilograms of cocaine for sentencing purposes. This court must also resentence the petitioner, as the court has erroneously sentenced the petitioner to the full weight of the conspiracy's drug quantity, without factual findings, of which it cannot legally do. *Id.* 15 F.3d at 1197.

It is without dispute that the petitioner's attorney should have presented this argument at sometime during the initial appeal and the appeal of the district court's resentencing. The petitioner's counsel should have also compelled the government to meet its burden of proving the drug type and quantity at sentencing, and that such was based on true and accurate information, testimony, and evidence. See, U.S. v. Sklar, 920 F.2d 107, 112-113 (1st Cir. 1990) and U.S. v. Garcia, 954 F.2d 12 (1st Cir. 1992). The petitioner's attorney was ineffective for failing to correctly litigate this argument, which caused the petitioner to suffer an erroneous increase in sentence.

Clear error has occurred and a manifest injustice exist in the present case, and this court must vacate the petitioner's sentence and order the case back to the district court for further proceedings in compliance with this argument.

For the following reasons stated, the petitioner's sentence must be vacated.



INEFFECTIVE ASSISTANCE OF COUNSEL AND CLEAR ERROR  
FOR DISTRICT COURT'S FAILURE TO MAKE FACTUAL FINDINGS  
OF LEADERSHIP ROLE AND GUN POSSESSION

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The petitioner contends that he has suffered a Sixth Amendment right violation of ineffective assistance of counsel, where his attorney failed to raise on direct appeal and remand that the district court erred in failing to make factual findings of the leadership role and the gun possession attributed to him by way of the sentencing guidelines at sentencing. Additionally, the petitioner contends that clear error has occurred, as he had a fundamental procedural guaranteed right pursuant to the Federal Due Process Clause, to have the district court make factual findings of the sentencing guidelines enhancements, and the court erred in failing to do so. See, U.S. v. St. Cyr, 977 F.2d 698, 701 (1st Cir. 1992).

The petitioner brings to the court's attention that just as drug type and quantity are attributed to a defendant, sentencing guidelines enhancements can be attributed to a defendant after proof beyond a reasonable doubt, a preponderance of the evidence, and after factual findings by the court. See, U.S. v. Shrader, 56 F.3d 291, 293 (1st Cir. 1995) and U.S. v. Voccola, 99 F.3d 37, 44 (1st Cir. 1996). Additionally, the government must present information, testimony, and evidence based on sufficient factual reliability and responsibility in attributing a defendant the enhancements, and the court must do the same in making factual findings. See, U.S. v. Cruz, 120 F.3d 1, 3 (1st Cir. 1997).

In the instant case, the court pointed to no specific time nor incident where the petitioner possessed a firearm during the conspiracy of the present case in attributing the petitioner the two (2) enhancement points for, nor was there any evidence that the petitioner possessed the firearm for potential use in connection with the conspiracy or drug trafficking activities related to the present case. See, Sentencing trans. of May 20, 2004, at pg. 15-18. Counsel did make objections at sentencing, yet, failed to have the court make factual findings as required by law, and counsel failed to raise the issue on either appeal in this manner. In any event, the petitioner was erroneously attributed the two (2) points for possessing a firearm during the conspiracy offense. See, *Id. Marrero-ortiz*, 160 F.3d at 778-779.

Also, the court pointed to no specific individuals whom the petitioner exercised control over during the conspiracy of the case, in order for him to receive a leadership and/or supervisor role. The record also fails to reflect the basis for the court's determination. The court failed to make specific factual findings on the matter, and no explanation can fairly be implied from the record as a whole that such an enhancement was to be attributed to the petitioner. *Id. Marrero-Ortiz*, 160 F.3d at 779. Counsel did make an objection at sentencing, yet, the court failed to make factual findings on the matter, and counsel failed to raise the issue on either appeal in this manner. *Id. Sentencing trans. of May 20, 2004, at pg. 4-5 and 15-18.*

Of overall importance, the petitioner contends that the information and testimony relied upon for attributing him the enhancement points for leadership and possession of a firearm during the conspiracy is false and unreliable. Id. Exh. B. Such cannot be used against the petitioner for sentencing purposes. Id. U.S. v. Tucker, supra.

It is without dispute that the petitioner's attorney should have presented this argument at sometime during the initial appeal and the appeal of the district court's resentencing. The petitioner's counsel should have also compelled the government to meet its burden of proving that the sentencing guidelines were warranted at sentencing, and the such was based on true and accurate information, testimony, and evidence. Id. U.S. v. Sklar, supra. and U.S. v. Garcia, supra. The petitioner's attorney was ineffective for failing to correctly litigate this argument, of which caused the petitioner to suffer an erroneous increase in sentence.

clear error has occurred and a manifest injustice exist in the present case, and this court must vacate the petitioner's sentence and order the case back to the district court for further proceedings in compliance with this argument.

For the following reasons stated, the petitioner's sentence must be vacated.

STRUCTURAL ERROR AND A VIOLATION OF THE PETITIONER'S  
FUNDAMENTAL PROCEDURAL GUARANTEED RIGHT TO NOTICE AND  
REASONABLE DOUBT INSTRUCTIONS TO THE JURY IN LIGHT OF THE  
RULINGS IN APPENDI, BLAKELY, AND BOOKER

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The petitioner brings to this court's attention that structural error has occurred in light of the Supreme Court's ruling in Appendi, Blakely, and Booker, where Appendi rendered drug type and quantity elements of a federal drug offense, and the jury was not instructed to determine guilt on the elements of drug type and quantity, nor determined guilt on the elements of drug type and quantity. The petitioner also contends that he has suffered a Fifth Amendment right violation pursuant to the Federal Due Process Clause, where he was not given notice that drug type and quantity were vital elements of his drug offenses at the time of trial, and where the court incorrectly gave the jury a reasonable doubt instruction on the elements of drug type and quantity. The petitioner further contends that his conviction and sentence must be vacated because of the constitutional violations that has occurred.

The law is established that structural error is an error that causes a defect affecting the framework within which the trial proceeds. See, Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The Supreme Court has long since ruled that structural error, which defies harmless and plain error review, occurs when the jury has not been instructed on the required elements of an offense, and when the jury has not determined guilt on the required elements of an offense. See, Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704.

(1986) and Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

The petitioner contends that such a structural error has occurred in the present case where drug type and quantity were not presented to the jury in its instructions for determining guilt, and when the jury did not determine guilt on the required elements of drug type and quantity.

The Supreme Court went on to further rule on the manner in which structural error applies in California v. Roy, 519 U.S. 2, 136 L.Ed.2d 266, 117 S.Ct. 337 (1996). In Roy, the Supreme Court noted:

"The specific error at issue here, an error in the instruction that defined the crime is as easily characterized as a misdescription of an element of the crime, as it is characterized as an error or omission." Id. 117 S.Ct. at 339.

The petitioner has previously presented the First Circuit a structural error claim in reference to his Apprendi, Blakely, and Booker violation. Id. Perez-Ruiz, 353 F.3d at 17 and 421 F.3d at 11. The First Circuit ruled that structural error does not occur when an Apprendi error is committed. Id. The Supreme Court will soon resolve the issue as to whether or not structural error occurs where an Apprendi, Blakely, and Booker, error is committed, which is relevant to the present case. See, Recueno v. Washington, U.S. No. 05-83, certiorari granted October 10, 2005. The petitioner's indictment charged him with conspiracy to distribute in excess of one (1) kilogram of heroin, in excess of five (5) kilograms of cocaine, in excess of fifty (50) grams of cocaine base in count one. See, Charging Indictment.

At the petitioner's trial, the court did not instruct the jury that the jury that drug type and quantity were elements of the drug offense, nor did the jury determine guilt on the elements of the drug offense, nor did the jury determine guilt on the elements of drug type quantity. See, Jury Instructions and Jury Verdict. The law established in Apprendi was not in fact at the time of the petitioner's trial.

The jury in this case did find that the charged conspiracy involved the drug type and quantities listed in any statutory provision and charged in the indictment. The law is now established that the jury instructions must supply a proper linkage with the drug type and quantity charged in the indictment. Id. Pérez-Ruiz, 353 F.3d at 16. The jury instructions in this case did not supply that linkage. Given the fact that the district court failed to instruct the jury that drug type and quantity were elements of the drug offenses in the indictment, and that drug type and quantity had to be proven beyond a reasonable doubt in determining guilt, structural error has occurred. It is irrelevant that the law established in Apprendi occurred after the petitioner's trial and sentencing, as structural error requires reversal without the application of harmless error, plain error, procedural bar, and waiver. Id. Clark, 478 U.S. at 577-78, 106 S.Ct. at 3105-06 and Fulminante, 499 U.S. at 310, 111 S.Ct. at 1265.

The petitioner also makes the claim that he was not afforded notice of the elements of drug type and quantity for his drug offense, and the court did not correctly instruct the jury on reasonable doubt in reference to the same drug offense.

The petitioner contends that his conviction and sentence cannot stand and/or be substantiated, as his conviction and sentence is not consistent with the fundamental notice requirements of the Federal Due Process Clause. The Supreme Court has long since ruled that such convictions must be vacated. See, Rabe v. Washington, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (1972).

In conjunction with Due Process right to notice, a defendant has a Due Process right to have the jury correctly instructed on the elements of a charged offense, as well as proof beyond a reasonable doubt on the same elements. See, Jackson v. Virginia, 443 U.S. 307, 316, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1970) and In Re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). Due Process forbids the conviction of a person of a crime without proof of the elements of that crime beyond a reasonable doubt. *Id.* Reviewing the facts of the present case as set out in the structural error argument, the jury was never instructed on the elements of drug type and quantity, nor did the jury determine guilt on the basis of drug type and quantity as elements. Such was a clear violation of the petitioner's procedural guaranteed right to Due Process.

The Supreme Court has addressed a similar matter with facts relevant to the present case, and determined that such violations warrant a petitioner's conviction being vacated. See, Fiore v. white, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). In Fiore, the Supreme Court heard a habeas petitioner's claim that he was entitled to the change of law that occurred in reference to a Pennsylvania statute of which he was convicted, where the change of law occurred after the petitioner's conviction became final.

The Supreme Court granted certiorari in part to decide when or whether the Federal Due Process Clause requires a state to apply a new interpretation of a state criminal statute retroactively on collateral review.

The Supreme Court ruled that "the case presents no issue of retroactivity. Rather, the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore, for conduct that its criminal statute, as properly interpreted, does not prohibit." *Id.* The court further ruled that its precedents make clear that Fiore's conviction and continued incarceration on the charge, violated due process, and reversed the judgment denying the petitioner relief. The court relied on Jackson v. Virginia and In Re Winship in making its decision. *Id.*

The facts circumstances, and applicable law set out in Fiore apply to the present case, where Apprendi clarified the law that drug type and quantity are elements of a federal drug offense, and the law must be applied retroactively to the case on collateral attack, because of the violation of the Federal Due Process Clause that has occurred. It is without dispute that the petitioner's conviction and sentence must be vacated because of the Apprendi violation that has occurred here.

There has been error by the district courts and the circuit courts in the majority, as all courts have erroneously ruled that the ruling in Apprendi does not retroactively apply to cases on collateral review. See, McCoy v. U.S., 266 F.3d 1245, 1256-57 (11th Cir. 2001). The district courts and the circuit courts have all acted contrary to the law established in the Supreme Court,



and none of the courts have addressed and adjudicated on the merits, the manner in which Apprendi is applied retroactively when a violation of the Federal Due Process Clause has occurred in light of Fiore.

For later arguments sake, and of additional importance, the Supreme Court's ruling in Blakely, where the Supreme Court ruled that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted to by the defendant. And the ruling in Booker, where the Supreme Court ruled that the ruling in Blakely applied to the Federal Sentencing Guidelines advisory, no longer mandatory, are both retroactively applicable to petitioner's case. The court erroneously used the mandatory scheme for sentencing. The petitioner contends also that the court sentence him beyond any statutory maximum he could face given the fact that the jury did not determine any drug type or quantity.

The ruling in Blakely and Booker, only reaffirmed the Sixth Amendment as established in Apprendi, which warrants the established law in those rulings being applied to the present case. See, Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534, 537, 98 L.Ed.2d 546 (1988). Apprendi was applied to the petitioner's case and Blakely, as well as Booker were applied to the petitioner's case in the appeal of his resentencing. Because the ruling in Blakely and Booker merely applied settled precedent of the Sixth Amendment in light of Apprendi, to new and different factual situations, the rulings must be retroactively applied on collateral review. See, U.S.v. Johnson, 457 U.S. 537, 549, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

The ruling in *Teague v. Lane*, 489 U.s. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), in reference to the nonretroactivity of such rulings is not applicable here. The present case involves structural error and a violation of the Federal Due Process Clause, both of which require relief without a retroactivity determination as set out in Teague.

It is without dispute that the petitioner has suffered a structural error and a violation of his fundamental procedural right to notice and a correct reasonable doubt instruction to the jury in light of Apprendi. The rulings in Apprendi, Blakely, and Booker, must be applied to the present case on collateral review, without a retroactivity determination. The petitioner's conviction and sentence must be vacated.

For the following reasons stated, the petitioner's drug conviction must be vacated, and the case ordered back to the district court for further proceedings.

INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends that although his claims being presented were fundamental errors, the claim of ineffective assistance of counsel is also applicable here. The petitioner has suffered a Fifth and Sixth Amendment right violation because of his attorney's ineffective assistance of counsel.

The Sixth Amendment in part provides, "in all criminal prosecutions, an accused shall enjoy the right to have assistance of counsel for his defense. The Sixth Amendment right to defense counsel in felony prosecutions is a fundamental right binding on the states through the Fourteenth Amendment as well." See, Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The standard which must be applied in determining what constitutes ineffective assistance of counsel are set forth in Strickland v. Washington.

The Strickland test has two components, both of which must be satisfied to establish that defense counsel's performance was ineffective. *Id.* at 687. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To make this showing, the defendant must demonstrate that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable.

A court deciding an actual ineffective assistance of counsel claim must judge the reasonableness of counsel's challenged conduct on the facts of a particular case, viewed at the time of counsel's conduct. A convicted defendant making claims of ineffective assistance of counsel must identify the acts of omission of counsel's that are alleged to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 690. The Supreme Court further recognized in Stickland, that counsel bears the duty to make reasonable investigation of the law and facts in his client's case. *Id.* at 691. Additionally, the ABA standards relating to the administration of criminal justice provides:

"It is the duty of the lawyer to conduct prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and the law enforcement authorities. The duty to investigate exist regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." *Id.* Standard 4-4.1

The Supreme Court has established that the standards for ineffective assistance of counsel is the same for trial and appellate counsel. See, Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1995). The petitioner has set out the errors that counsel made in the present case, which rendered counsel's performance ineffective.

In the instant case, counsel vigorously argued at sentencing and prior to sentencing, that the petitioner's presentence

report did not attribute him a base offense level for any drug type or quantity, and that a calculation for drug type and quantity was necessary to determine the base offense level. Id. Exh. A. Although, the petitioner's attorney raised an Apprendi issue on his behalf on direct appeal, counsel did not fully and fairly argue the drug type and quantity determination as now being presented to the court. Counsel also failed to argue the claim on remand and the appeal of the remand. Here, it is clear that counsel should have argued that the government should have met its burden of proving the drug type and quantity attributed to the petitioner, and that the court had a duty to make factual determinations in attributing the petitioner drug type and quantity. Overall, the government had to prove that the drug type and quantity that would be attributed to the petitioner was based on true and accurate information, testimony, and evidence, and the court had to determine whether the information, testimony, and evidence that determined drug type and quantity, was based on true and accurate information. The petitioner's attorney never presented the claim that the petitioner's drug type and quantity was based on false and unreliable information and testimony, and there existed no evidence of drug type and quantity on record.

As an additional matter, structural error, in light of an Apprendi, Blakely, and Booker error is now being addressed by the Supreme Court. The petitioner sought relief by way of structural error claims on direct appeal and the appeal of the remand, and counsel has failed to pursue the issue to the Supreme Court.

The petitioner's sentence and conviction is unjust, and the errors that occurred for the most part, resulted from the petitioner's attorney's deficient performance. It is clear that the petitioner had a fundamental right to the application of the law established in Apprendi, Blakely, and Booker. Had counsel argued his claims correctly, as now being presented, the petitioner would not have suffered an erroneous increased sentence at the least.

Given counsel the benefit, counsel has attempted to litigate the petitioner's Apprendi, Blakely, and Booker claims fairly, and if this court concludes that counsel was not ineffective, the violation of the petitioner's fundamental rights compels this court to grant the petitioner the just and proper relief. This case reaps circumstances where had counsel performed as the counsel guaranteed by the Sixth Amendment, the petitioner would not have suffered an increased sentence for drug type and quantity. See, Tajeda v. Dubois, 142 F.3d 18, 22-25 (1st Cir. 1998), U.S. v. Ortiz, 146 F.3d 25, 27-28 (1st Cir. 1998), and U.S. v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000).

The Supreme Court has ruled that counsel is rendered ineffective for allowing a defendant's sentence to be erroneously enhanced only recently. See, Glover v. U.S., 531 U.S. 198, 148 L.Ed.2d 604, 121 S.Ct. 696 (2000). The Supreme Court has also recently ruled that counsel's failure to raise issues in the district court and on direct appeal renders counsel ineffective, and waiver nor procedural bar prevents the petitioner from obtaining relief. See, Massaro v. U.S., 538 U.S. 500,

509, 155 L.Ed.2d 714, 123 S.Ct. 1690 (2004). Certainly, the petitioner's attorney was ineffective in the present case, which rendered the entire proceedings fundamentally unfair. The petitioner is entitled to relief.

For the following reasons stated, the petitioner must be granted the just and proper relief requested in all claims presented

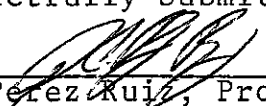
CONCLUSION

This court should readily address and adjudicate the merits of the petitioner's claims, and hold an evidentiary hearing to resolve the errors that have occurred.

The petitioner request an evidentiary hearing to resolve the matters of a fundamental miscarriage of justice that has occurred, of which has affected the fundamental fairness of the proceedings and the court. See, U.S. v. Addonizio, 442 U.S., 178, 185, 99 S.Ct. 2235, 2240, 60 L.Ed.2d 805 (1979).

Wherefore, the petitioner request this honorable court to grant him the requested relief in the present § 2255 motion, as he is entitled to relief in reference to the claims presented to this court, or an evidentiary hearing should be held without hast.

Respectfully Submitted,

  
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing  
has been forwarded to the following parties listed below by way  
of United States Mail on this 31 day of January 2005.

United States Attorneys Office  
Attn: Sonia Torres, AUSA  
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